No. 16-980

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, KENTUCKY, MARYLAND, NEW MEXICO, OREGON, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Ohio's "Supplemental Process"—which relies only on a registrant's failure to vote during a two-year period as the basis for subjecting her to a process that results in the registrant's removal from the voter rolls unless she takes affirmative steps to retain her registration—violates the National Voter Registration Act of 1993, 52 U.S.C. § 20507, which prohibits any list-maintenance program that "result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote."

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INTEREST OF AMICI CURIAE

Like Ohio, amici States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Kentucky, Maryland, New Mexico, Oregon, and Washington, and the District of Columbia are responsible for maintaining accurate and up-to-date statewide voter registration rolls in a manner consistent with the National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA). These federal statutes were enacted to ensure that the States administer the voter-registration process for federal elections in a manner that "enhances the participation of eligible citizens as voters," rather than serving as a barrier to voting. 52 U.S.C. § 20501(b)(2). In particular, Section 8 of the NVRA, while recognizing that States should remove ineligible persons from the voter rolls, prohibits any maintenance procedure that "result[s] in the removal . . . of any person from the official list of voters registered to vote . . . by reason of the person's failure to vote." *Id.* § 20507(b)(2).

Contrary to Section 8 of the NVRA, Ohio's "Supplemental Process" subjects a registered voter to a procedure that results in his removal from the voter rolls based solely on his failure to vote during a two-year period—which would cover only a single federal election—unless he takes affirmative steps to retain his registration. Ohio's justification for the Supplemental Process is that a registrant's failure to vote provides reliable evidence that the registrant has moved away from a jurisdiction, rendering him ineligible to vote there. But amici States have declined to rely on such an inference, or have repealed statutes similar to Ohio's since the NVRA's passage, and for good reason: in amici States' experience, voter

inactivity during a single two-year period is a poor proxy for changed residence because large numbers of citizens decline to vote for reasons having nothing to do with moving away.[1]

Amici States submit this brief to explain, on the basis of their experience, that States have a broad array of other, better tools to identify voters who have changed residence. In light of these other available options, reliance on voter inactivity during only a two-year period to target registrants for potential removal poses unacceptable risks of disenfranchising eligible voters and thus undermines rather than enhances the accuracy of voter registration rolls.

STATEMENT

Every State except North Dakota requires citizens to register before voting.[2] States typically require citizens to identify themselves and their residence and to establish their eligibility before adding them to voter registration rolls.[3] On the day of an election, local elections officials use registration rolls to ensure

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[1] Ohio has wrongly suggested (Pet. 17-18) that Hawai'i and Illinois use voter inactivity as a basis to purge voters from the rolls. To comply with the NVRA, Hawai'i no longer enforces its pre-NVRA statute on inactivity, Haw. Rev. Stat. § 11-17. And Illinois's statutory provisions have been superseded by court orders, *see, e.g.*, *Association of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791 (7th Cir. 1995), as recognized in state administrative regulations, 26 Ill. Admin. Code § 216.50.

[2] *See* U.S. Election Assistance Comm'n, *The Election Administration and Voting Survey, 2016 Comprehensive Report* 6 (2016) (internet). (For authorities available on the internet, URLs are listed in the table of contents.)

[3] *See, e.g.*, N.Y. Elec. Law §§ 5-102, 5-104; Cal. Elec. Code § 2102.

that each voter is eligible, is voting in the correct district, and has not already voted.

Registration serves important state interests by providing a mechanism for States to ensure that each ballot is cast by an eligible voter in the correct voting district. *See* S. Rep. No. 103-6, at 18 (1993). But registration requirements have also been used in the past to impose burdens that prevent or deter eligible voters from casting a ballot. Congress enacted the federal statutes at issue in this case—the NVRA and HAVA—to prevent registration requirements from being barriers to voting, to simplify registration procedures, and to make registration more easily accessible so that all eligible voters have the opportunity to vote. In conjunction with these federal statutes, many States have pursued additional important reforms to ensure that their registration practices promote rather than impair the ability of eligible voters to cast a ballot.

A. Historical Registration Practices

When Congress enacted the NVRA, it recounted the long post–Civil War history of the States' use of cumbersome registration procedures to reduce the number of former slaves and new immigrants who could successfully register to vote. *See, e.g.*, H.R. Rep. No. 103-9, at 2 (1993). For example, between 1890 and 1910, local registrars in South Carolina purged voters who changed their residence in an effort to deregister seasonal black farmers. And in Louisiana, voters were required to periodically reregister, a burdensome requirement that in practice drastically reduced African-American registration. *See* Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United*

States, 9 Yale L. & Pol'y Rev. 370, 373, 377-78 (1991); S. Rep. No. 103-6, at 3 (discussing "annual registration" requirements).

States persisted in these efforts through the first half of the twentieth century. For example, states lengthened residency requirements for registration, required periodic registration at specified locations during work hours, demanded detailed information from applicants for registration, gave elections officials vast discretion to purge voter rolls of persons they found ineligible, and permitted widespread challenges to voters at the polls. *See* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 William & Mary Bill of Rights J. 453, 459-60 (2008); R. Michael Alvarez, Thad E. Hall & Morgan Llewellyn, *How Hard Can It Be: Do Citizens Think It Is Difficult to Register to Vote?*, 18 Stan. L. & Pol'y Rev. 382, 387 (2007).

Congress recognized that these obstacles to registration contributed to declining turnout, particularly from minority and poor voters. Overall turnout in presidential elections in the South fell to 19% in 1924, with the black vote falling from 44% to essentially nil. *See* H.R. Rep. No. 103-9, at 2. As late as 1964, registration rates among African-American voters in the States that had adopted such practices remained very low: 19% were registered in Alabama, 32% in Louisiana, and 6% percent in Mississippi—roughly 50 percentage points below the figures for white voters. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2619, 2624-25 (2013).

B. Federal Regulation of State Voter-Registration Procedures for Federal Elections

1. The National Voter Registration Act

Congress initially responded to discriminatory voting practices by passing the Voting Rights Act of 1965, which abolished practices, standards, and procedures that denied the right to vote on the basis of race or color. *See, e.g.*, 52 U.S.C. § 10301. Although the Voting Rights Act "wrought dramatic changes," it failed to eliminate "all vestiges of discrimination against the exercise of the franchise by minority citizens," including abuses of registration procedures. *Shelby County*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting). For example, in 1966, Texas amended its constitution and statutes to require voters to reregister every year, purportedly to prevent election fraud. *See Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 683 (S.D. Texas 2017).[4] The Voting Rights Act also did not halt the national decline in voter turnout in federal elections, which reached its lowest point in forty years for a presidential election in 1988, when only half the voting-age population cast a ballot.[5]

In 1993, Congress enacted the National Voter Registration Act (NVRA) to address the "unfinished business of registration reform" begun with the Voting

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[4] That annual-registration requirement was ultimately struck down as unconstitutional in 1971. *See Beare v. Smith*, 321 F. Supp. 1100, 1107-09 (S.D. Tex. 1971), *aff'd sub nom. Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974).

[5] *See* Congressional Research Serv., *The National Voter Registration Act of 1993: History, Implementation, and Effects* 2 (Sept. 2013) (internet).

Rights Act. H.R. Rep. No. 103-9, at 3. Congress understood that cumbersome or inconvenient registration procedures were preventing eligible voters in general from registering to vote and thus depressing turnout for federal elections across all populations. Congress further recognized that "[t]hroughout the history of this country there have been attempts to keep certain groups of citizens from registering to vote," including through "annual registration, selective purging of the voter rolls, literacy tests and poll taxes." S. Rep. No. 103-6, at 3; *see also* H.R. Rep. No. 103-9, at 4 ("registration procedures in the United States were not uniform, were not nondiscriminatory and, in some cases, were interpreted in such a manner as to deny eligible citizens their right to vote"). Congress found that such "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation" and can "disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(3). Such practices are inconsistent with the "duty of the Federal, State, and local governments to promote the exercise" of the "fundamental right" to vote. *Id.* § 20501(a)(1)-(2).

To protect that fundamental right, the NVRA required States to comply with two categories of registration reforms that together would reduce obstacles to voting in federal elections to "the absolute minimum." *See* H.R. Rep. No. 103-9, at 3.

First, Congress sought to improve the ways in which eligible voters could register to vote in federal elections. The NVRA "requir[ed] States to provide simplified systems for registering to vote," *Young v. Fordice*, 520 U.S. 273, 275 (1997), by mandating that States permit citizens to register (or to update their

registration) to vote in federal elections through at least five different means:

(1) at the state department of motor vehicles when they apply for a driver's license;

(2) through the mail;

(3) at all offices for state public assistance;

(4) at all offices for disability assistance; and

(5) at other registration agencies designated by the States, such as libraries and public schools.

See 52 U.S.C. §§ 20503-20506.

Second, in order to "prevent the discriminatory nature of periodic voter purges," S. Rep. No. 103-6, at 20, Congress narrowed the procedures that States could use to remove voters from the rolls for federal elections. As an initial matter, Congress hoped that improved procedures for registering voters and updating voter information would "minimize the necessity for periodic, large scale purges" and perhaps even render such purges "superfluous." *Id.* at 16, 18. But to the extent that such purges continued to occur, Congress intended that special care be taken to update the lists in a fair and transparent manner, *see* H.R. Rep. No. 103, at 15-16, and that such methods "be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register," S. Rep. No. 103-6, at 18.

To address these concerns, Congress limited "when, and how, States may remove people" from the voting rolls. *Young*, 520 U.S. at 276. States are barred from removing registered voters from their rolls

except for certain carefully defined reasons—including, as relevant here, in response to "a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4)(B). State procedures for deregistering voters based on change of residence must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." *Id.* § 20507(b)(1). Any removal must be complete at least ninety days before the election. *See id.* § 20507(a)(3)-(4), (c)(2)(A). And removal based on change of residence may not take place unless (1) the registrant confirms his move in writing, or (2) the State satisfies a two-step confirmation procedure under which the registrant *both* fails to respond to a confirmation notice *and* does not vote within the next two general federal elections. *See id.* § 20507(d)(1).

Congress did not set forth an exhaustive list of ways that a State may determine whether a voter has moved outside a registration district, but it addressed the subject twice. First, Congress specifically provided that a State may use the appearance of a registrant's name in the U.S. Postal Service's National Change of Address (NCOA) database as a basis to "identify registrants whose addresses may have changed." *Id.* § 20507(c)(1)(A); *see* H.R. Rep. No. 103-9, at 15. A State could thus remove such a registrant after following the two-step confirmation procedure in § 20507(d)(1)(B).

Second, Congress specifically rejected the States' prior use of voter inactivity to identify registrants for purging. Before the NVRA's passage, most States and the District of Columbia used failure to vote as a criterion for deregistering voters. *See* Steve Barber et al., Comment, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 Harv. C.R.-

C.L. L. Rev. 483, 499 (1988); *see also* Pet. Br. 4. Congress acknowledged that many States used "non-voting merely as an inexpensive method for eliminating persons believed to have moved," S. Rep. No. 103-6, at 17, but it recognized that many nonvoters may not have moved at all and concluded that they should stay registered "[s]o long as they remain eligible to vote in their current jurisdiction." *Id.* at 2. *See* H.R. Rep. No. 103-9, at 18. The NVRA accordingly provided that the States' roll-maintenance procedures cannot "result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2); *see* NVRA, Pub. L. 103-31, § 8(b)(2), 107 Stat. 77, 83 (1993). The purpose of this provision was to ensure that nonvoters would not be required to re-register "except upon a change of voting address to one outside their current registration jurisdiction." S. Rep. No. 103-6, at 2.

2. The Help America Vote Act

A decade later, Congress considered the need for further improvements to voter registration and enacted the Help America Vote Act (HAVA) of 2002. *See* H.R. Rep. No. 107-329, pt. 1, at 31 (2001). HAVA made two overarching changes relevant to this case.

First, Congress required that each State implement a centralized, electronic registration roll that would be maintained and administered "at the State level" and would contain registration information for every registered voter. *See* 52 U.S.C. § 21083(a)(1)(A). This roll must serve as the "single system for storing and managing" each State's registration roll, must be updated on an expedited basis by local officials, and must be "coordinated with

other agency databases within the State." *See id.* § 21083(a)(1)(A)(i), (iv), (vi).

Second, States must take steps to ensure that registration records are accurate, including by making "a reasonable effort to remove registrants who are ineligible to vote." *Id.* § 21083(a)(4)(A). But any such removal efforts must still be done in accordance with the NVRA. *Id.* § 21083(a)(2)(A)(i). In particular, Congress reiterated its 1993 dictate that "no registrant may be removed solely by reason of a failure to vote." *Id.* § 21083(a)(4)(A).

C. State Reforms to Voter Registration

In parallel with these federal reforms, States have undertaken their own efforts to improve registration procedures and expand access to the polls. In particular, the "concern that registration procedures were depressing turnout—and therefore ran counter to the new spirit of voting laws in general—led many states in the 1970s and 1980s to streamline their registration procedures."[6] "Some permitted registration by mail; others allowed voters to register at a wide variety of public offices; a few even allowed voters to register on election day."[7]

Even after the passage of the NVRA and HAVA, States continue to pursue diverse ways to eliminate any barriers that registration requirements might otherwise pose. The majority of States now offer online

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[6] Alexander Keyssar, *The Right to Vote* 254 (rev. ed. 2009).

[7] *Id.*

voter registration.[8] When voters move, many of these States offer easy-to-use, online tools that allow voters to check their registration status and update their address information.[9] Ten States and the District of Columbia provide for "automatic" voter registration by which eligible citizens who have used the services of designated offices are automatically registered to vote without needing to complete an additional application.[10] And States have incorporated a number of protections in their deregistration procedures to ensure that they do not mistakenly remove eligible voters. See *infra* at 22-28.

SUMMARY OF ARGUMENT

Voter inactivity is a poor measure to identify ineligible voters. Ohio presumes that a registrant who has failed to vote in a single federal election has likely moved outside his registration jurisdiction. But in any particular election, many people decline to vote for reasons having nothing to do with changing their residence. And voter turnout among particular demographic groups—including racial minorities, young voters, poor voters, uneducated voters, and voters with disabilities—historically has been even more depressed than in the general population. Targeting nonvoters for a State's deregistration process thus threatens to disenfranchise many eligible voters,

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[8] *See* U.S. Election Assistance Comm'n, *supra*, at 50-51; *see also id.* at 6, 41.

[9] *See, e.g.*, California Sec'y of State, *My Voter Status* (internet); California Sec'y of State, *California Online Voter Registration* (internet).

[10] See Brennan Ctr. for Justice, *Automatic Voter Registration* (internet).

particularly in populations with lower rates of voter turnout.

There is no pressing need for States to target nonvoters. In amici States' experience, there are far better sources of readily available evidence that a voter has moved than the mere fact that a person did not vote. States may use change-of-address information from the U.S. Postal Service, as specifically approved by Congress, 52 U.S.C. § 20507(c)(1)(A), or they may track mail that is returned as undeliverable, including sample ballots or other election-related mailings. They may reconcile the information on their voter registration rolls with other, potentially more up-to-date public or private sources of information. They may offer voters online tools to inform elections officials of changes of address. And they may cooperate with other States to share information so that they can be reliably informed when one of their residents moves to another State.

Relying on voter inactivity rather than these other, more direct sources of information about likely change of residence creates a substantial and unnecessary risk that eligible voters will be removed from the rolls—a risk that is not adequately cured by a State's use of the NVRA's confirmation procedure. Such erroneous removals seriously injure voters by preventing them from exercising their fundamental right to vote. In addition, these errors impose substantial costs on local and state elections officials who must correct these errors and handle complaints from surprised and irate voters who discover—often for the first time on election day—that their registrations were canceled. By contrast, keeping inactive voters on the registration rolls imposes relatively fewer harms because in our experience few if any inactive voters

who have actually moved away nonetheless vote at their old addresses.

ARGUMENT

I. Voter Inactivity Is a Poor Proxy for Identifying Voters Who Have Changed Their Residence.

Ohio and its amici justify the Supplemental Process as an appropriate method of purging voters who have likely become ineligible due to changed residence, on the ground that a lack of voter activity is a reliable indicator that a voter "may have moved." Pet. Br. 10; *see* U.S. Br. 12-13; Georgia et al. Amicus Br. 2-3, 5. But voter inactivity is a poor measure for identifying voters who have left a jurisdiction. Many people decide not to vote for reasons that have nothing to do with changing their residence. And because certain groups of voters—including racial minorities and the poor—have historically had lower voter turnout than the general population for reasons having nothing to do with changes of residence, Ohio's Supplemental Process will disproportionately affect the very voters whom the NVRA was designed to protect. While reliance on voter inactivity may thus, "in a crude way, exclude nonresidents" from remaining on registration rolls, it will "also exclude[] many residents" who are still eligible to vote but have not exercised that right, *Dunn v. Blumstein*, 405 U.S. 330, 351 (1972) (using similar reasoning to invalidate a durational-residence requirement for voter registration as excluding too many otherwise qualified voters).

A. Many Eligible Voters Do Not Vote for Reasons Having Nothing to Do with Changing Residence.

In 2016, "millions of Americans from all walks of life took part in a time-honored national tradition: They did not vote."[11] A staggering 37% of eligible voters—82 million people—chose not to vote in the 2016 presidential election,[12] and up to about 40% have made the same choice in presidential elections going back to 1980.[13] Voter turnout is even lower for midterm congressional elections: in 2014, for example, 60% of eligible voters nationwide did not vote.[14]

There are many reasons that otherwise eligible voters may sit out an election. *See Michigan State UAW Cmty. Action Program Council (CAP) v. Austin*, 387 Mich. 506, 515 (1972). Practical obstacles may prevent people from voting: for example, many voters may be too busy, may fall ill on election day, or may have difficulty finding transportation to the polls.[15]

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[11] Campbell Robertson, *Millions on Election Day Make a Different Decision: Not Voting*, N.Y. Times, Nov. 8, 2016 (internet).

[12] *See* U.S. Election Assistance Comm'n, *supra*, at i, 5, 21 tbl. 1.

[13] *See, e.g.*, U.S. Census Bureau, *Voting in America: A Look at the 2016 Presidential Election* (internet); U.S. Government Accountability Office (GAO), *Issues Related to Registering Voters and Administering Elections* 12 (GAO-16-630 June 2016) (internet).

[14] *See* U.S. Census Bureau, *Voting Hot Report* (internet); U.S. GAO, *supra*, at 12; U.S. Census Bureau, *Who Votes? Congressional Elections and the American Electorate: 1978-201*, at 3 tbl. 1 (July 2015) (internet).

[15] *See* Caltech/MIT Voting Tech. Project, *Voting: What Is, What Could Be* 13 (July 2001) (internet); National Comm'n on

Other citizens "are simply not interested in politics,"[16] or may be disenchanted by a particular election and decline to participate out of protest, *see Austin*, 387 Mich. at 388.[17] None of these reasons have anything to do with moving out of a jurisdiction and thereby losing eligibility to vote in that jurisdiction.

In contrast to the large numbers of citizens who do not vote, only a smaller number of residents move. Approximately 12% of Americans change residences every year.[18] And a much smaller number—about 4%—move out of their registration jurisdictions and would thus become ineligible to vote there.[19] Given this striking disparity between the large numbers of Americans who do not vote and the much smaller numbers who move in a way that affects their eligibility to vote, it makes little sense to view voter inactivity as a particularly probative measure of change of residence.

Fed. Election Reform, *To Assure Pride and Confidence in the Electoral Process* 39 (Aug. 2001) (internet) (polling top ten reasons for nonvoting).

[16] Caltech/MIT Voting Tech. Project, *supra*, at 13.

[17] *See, e.g.*, Robertson, *supra* (describing one voter who could not "in good conscience vote" because she viewed Donald Trump as "despicable" and Hillary Clinton as "untrustworthy").

[18] *See* U.S. Census Bureau, *CPS Historical Migration/ Geographic Mobility Tables*, tbl. A-1, rows 91-97, col. D (Nov. 2016) (internet).

[19] *See id.*, tbl. A-1, rows 91-97, col. G. Where a voter has moved *within* the same jurisdiction and has not informed elections officials of his or her new address, the NVRA contains fail-safe provisions that permit the voter to correct the voting records on election day and to cast a ballot. 52 U.S.C. § 20507(e).

Ohio's Supplemental Process is especially problematic because it targets voters who do not vote in only a two-year period, which would cover a single federal election. Unlike other States that consider much longer periods of inactivity, *see, e.g.*, Or. Admin. R. 165-005-0180 (ten years);[20] 25 Pa. Cons. Stat. § 1901(b)(3) (five years), Ohio thus presumes that a voter who sits out just one federal election—for example, because he or she only votes in presidential elections—has moved away and is no longer eligible to vote.

Such a presumption finds no support in the NVRA, contrary to the claims of Ohio and its amici (*e.g.*, Pet. Br. 24; U.S. Br. 31-32). The NVRA uses inactivity as part of its process for *confirming* that a voter has in fact moved away from a district. *See* 52 U.S.C. § 20507(d)(1). As respondents have correctly noted (Resp. Br. 38-41), a confirmation process by definition seeks to "verify[] or corroborat[e]" other evidence, *Black's Law Dictionary* 362 (10th ed. 2014)—in this context, reliable affirmative evidence that a voter has changed residence. Such evidence might include a

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[20] Contrary to respondents' suggestion (Resp. Br. 15-16 & n.8), Oregon's scheme is distinct from Ohio's in several ways. As noted, the Oregon Secretary of State has adopted an administrative rule requiring at least ten years without voting (and absence of any other registration update) before a voter's registration can be made inactive under Oregon Revised Statute § 247.013. *See* Or. Admin R. § 165-005-0180. Moreover, Oregon links driver license information with voter registration information. *See* Or. Rev. Stat. § 247.017. Because driver licenses must be renewed every eight years, Or. Rev. Stat. § 807.130, a voter who has neither voted nor updated his registration information for ten years has likely allowed his Oregon driver license to lapse as well, providing a second indication that the voter has moved.

change-of-address request submitted by the voter himself to the Postal Service; updated address information submitted by the voter to other local or state agencies; or a voter's application to register to vote in another State. *See* 52 U.S.C. § 20507(c). See *infra* at 22-28.

Absent such evidence, voter inactivity alone is not a reliable indicator of change of residence. And a voter's mere failure to respond to a confirmation notice is also not sufficient evidence that he has moved. As with voter inactivity, there are many reasons other than change of residence that would lead voters not to respond to a notice: they may not have received the notice; they may not give a single mailed notice sufficient attention, particularly in an era when people are more accustomed to communicating electronically rather than on paper; or they may not be accustomed to responding to government requests for information.[21]

There is an important difference between using voter inactivity to confirm affirmative evidence of change of residence, as provided by the NVRA, and using voter activity to commence the process of deregistering, as provided by Ohio law. When a voter has taken affirmative steps to inform state or local officials that he has moved, a long period of nonvoting—such as the two federal election cycles in

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[21] *See* Cunningham, *supra*, at 393 (observing that "a major contributor to low response rates in minority communities may be ineffective mail delivery"); U.S. Census Bureau, *An Examination of Self-Response for Hard-to-Interview Groups When Offered an Internet Reporting Option for the American Community Survey* 1, 3-4 (Sept. 4, 2015) (internet) (noting that young people, poor people, and those with less educational attainment are less likely to respond to mail).

the NVRA's confirmation process—provides useful corroboration that the voter has followed through with and adhered to his representation. By contrast, when there has been no such affirmative evidence and deregistration rests entirely on inaction—i.e., failure to vote and failure to respond to a notice—the risk is much greater that an eligible voter will be mistakenly targeted for purging, upsetting the careful balance struck by Congress in the NVRA.

B. A Deregistration Process Triggered by Failure to Vote Will Mistakenly Exclude Certain Voters—Including Racial Minorities, the Poor, and the Disabled—at Disproportionate Rates.

Voter inactivity is a particularly poor proxy for change of residence for certain identifiable demographic groups that historically have had even lower voter turnout than the general population for reasons having nothing to do with those groups' moving patterns.

1. The Census Bureau reports that voting rates in presidential elections have varied widely by race and Hispanic origin.[22] White voters have cast ballots at higher rates than African-Americans and Hispanics in nearly every presidential election since 1968.[23] In

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[22] *See* U.S. Census Bureau, *Voting Hot Report*, *supra*; U.S. Census Bureau, *Voting in America*, *supra*.

[23] *See* U.S. Census Bureau, *Blacks Voted at a Higher Rate than Whites in 2012 Election—A First, Census Bureau Reports* (May 8, 2013) ("*Blacks Voted at a Higher Rate*") (internet); U.S. Census Bureau, *Voting Rate by Race and Hispanic Origin* (May 2017) (internet).

congressional elections too, voting rates for African-Americans and Hispanics have trailed rates for whites for many decades.[24]

Young people also vote at disproportionately lower rates.[25] Indeed, in every presidential election since 1964, 18-to-24-year-olds voted at lower rates than other age groups. By comparison, those 65 or older voted at higher rates than all other age groups since 1996, often 20 to 30 percentage points higher than the youngest voters.[26] And these disparities can be even greater in congressional elections.[27]

Poorer people are also less likely to vote. *See* Tokaji, *supra*, at 496; *see id.* at 483. In 2014, for example, the turnout rate for those with an annual family income of $100,000 or greater was as high as 56%, but the rate for those making less than $30,000 was only 31%.[28] Relatedly, Americans who are

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[24] *See* U.S. Census Bureau, *Who Votes?*, *supra*, at 4.

[25] U.S. Census Bureau, *Census Bureau Reports Congressional Voting Turnout Is at Lowest Mark Since 1978* (July 2015) (internet); *see also, e.g.*, U.S. Census Bureau, *Voting in America*, *supra*, at fig. 4; U.S. Census Bureau, *Blacks Voted at a Higher Rate*, *supra*.

[26] U.S. Census Bureau, *Census Bureau Statistics Explore Voting Patterns of Young Adults* (April 2014) (internet); Commission on Fed. Election Reform, *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* 42 (Sept. 2005); U.S. GAO, *supra*, at 66; U.S. Census Bureau, *Voting Rates by Age* (internet).

[27] *See* U.S. Census Bureau, *Who Votes?*, *supra*, at 5; U.S. GAO, *supra*, at 66.

[28] *See* U.S. Census Bureau, *Who Votes?*, *supra*, at 7 tbl. 2.

unemployed consistently turn out at lower rates than those who maintain employment.[29]

Likewise, voting rates increase with education.[30] For example, in presidential elections, turnout for those with a college degree reaches approximately 80%; for those with a high school diploma, it has been approximately 60%; and for those without a diploma, it has been approximately 40%.[31]

Finally, individuals with disabilities have historically voted at lower rates than those without disabilities.[32] In 2000, for example, 42% of eligible individuals with disabilities voted, compared with 52% of those without. More than one decade later, in both 2012 and 2016, approximately 56% of eligible individuals with disabilities voted, compared with approximately 63% without.[33]

2. There are many reasons that these groups have historically had lower rates of voter turnout than the

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[29] *See* U.S. Census Bureau, *Percent Voted by Labor Force Status: Congressional Elections* (internet); U.S. Census Bureau, *Percent Voting by Labor Force Status: Presidential Elections* (internet); U.S. Census Bureau, *Voting and Registration in the Election of November 2016*, at tbl. 6 (internet).

[30] U.S. Census Bureau, *Voting Hot Report*, *supra*; *see also* U.S. Census Bureau, *Percent Voted by Educational Attainment* (internet); Jan E. Leighley & Jonathan Nagler, *Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States* 27, 45-46, 66 (2014).

[31] *See* U.S. GAO, *supra*, at 68.

[32] The Pew Charitable Trusts, *National Disability Voter Registration Week Promotes Election Access* (internet).

[33] *Id.*; *see* U.S. Census Bureau, *Voting and Registration in 2016*, *supra*, at tbl. 6.

general population. The critical point is that most of these reasons have nothing to do with higher rates of changes of residence. For example, younger voters may have lower rates of civic engagement and political mobilization.[34] Less educated voters may be uninterested in politics and unequipped to navigate legal requirements or information costs of learning about issues.[35] Poor voters may have less time to devote to political matters and less resources for accessing the polls due to less flexible job schedules and fewer options for transportation.[36] Disabled voters may be deterred from casting a ballot by inaccessible voting locations, inconvenient voting technology, and insufficiently trained officials.[37] And there are significant racial, age, and other disparities in the distribution of various forms of identification that many States now require voters to bring to the polls.[38] These additional reasons for depressed turnout further undermine the validity of inferring change of residence from the mere fact that a person has failed to vote.

These disparities in voter turnout also make reliance on voter inactivity inconsistent with one of the underlying purposes of the NVRA. Because voter turnout is persistently lower for certain identifiable groups, a purging process that is targeted at nonvoters is likely to focus a State's deregistration efforts on

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[34] *See* Leighley & Nagler, *supra*, at 32-33, 72-76.

[35] *See id.* at 25, 58-59.

[36] *See id.* at 6, 59.

[37] *See* Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 Stan. L. Rev. 1491, 1497-98 (2016).

[38] *See* Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 659-60 (2007).

those groups—which include populations that have historically faced burdens on their right to vote. But Congress enacted the NVRA in part to increase turnout among such voters and to avoid purges targeted at them. The NVRA was a direct response to historical "attempts to keep certain groups of citizens from registering to vote" by imposing burdensome registration requirements on them and targeting them with selective purging efforts. *See* S. Rep. No. 103-6, at 3. And in particular, Congress recognized that purging practices based on nonvoting "tend[] to disproportionately affect persons of low incomes, and blacks and other minorities." *Id.* at 17-18. Targeting nonvoters for deregistration, as Ohio's Supplemental Process does, thus undermines the NVRA's purpose of expanding registration opportunities and limiting purging efforts that disproportionately affect certain groups.

C. States Can Rely on More Direct and Reliable Evidence to Identify Voters Who Have Moved Away.

There is no pressing reason for States to use voter inactivity as a trigger for deregistration in light of a broad array of better methods that they may employ to identify voters who have in fact changed their residence.

1. States can and do avail themselves of various sources of *direct* evidence that a voter has moved to a different jurisdiction. The NVRA identifies one such source of evidence that Ohio and many other States use: change-of-address information that individuals submit to the Post Office and that become part of the NCOA Database. See *supra* at 8. Congress has "strongly encourage[d] all States to implement the

NCOA program," S. Rep. No. 103-6, at 19, which is "the most efficient and cost-effective method of keeping registration lists up-to-date," H.R. Rep. No. 103-9, at 5.

The NCOA Database is not the exclusive source of direct affirmative evidence that a voter has moved. Many States, including Ohio (Pet. Br. 57), regularly engage in broad-based, statewide mailings to potential voters.[39] Such mail is useful to "communicate basic procedural information (such as when an election is taking place and how a person may register or vote), or more detailed information about races and measures on the ballot."[40]

But States can also use these communications to determine whether a voter has changed residence. Specifically, the Postal Service will return mail as undeliverable if it has no record of a person at a particular address. Many States provide for the use of such undeliverable returns as reliable evidence that a voter no longer lives at the address in the registration rolls.[41] Ohio does not similarly use evidence that its

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[39] *See, e.g.*, Ala. Code § 17-4-30(a) (requiring nonforwardable mailings to every registered voter every four years to identify changes-of-address); Cal. Elec. Code §§ 2220, 2223 (permitting county elections officials to send address confirmation postcards or sample ballots); N.Y. Elec. Law § 4-117 (requiring nonforwardable mailings about upcoming elections, ballot issues, and polling places); R.I. Gen. Laws § 17-5-3 (requiring mailings of ballot questions to "each residential unit").

[40] U.S. GAO, *supra*, at 74.

[41] *See, e.g.*, Ala. Code § 17-4-30; Ariz. Rev. Stat. § 16-166(A); Ark. Const. amend. 51, §§ 10(f), 11(g); Cal. Elec. Code § 2226; Colo. Rev. Stat. § 1-2-605(1), (5); Conn. Gen. Stat. §§ 9-32, 9-35(e); Neb. Rev. Stat. § 32-329(2); N.M. Stat. Ann. § 1-4-28(B); N.Y.

mailings are undeliverable as an indicator that a voter has changed residence.[42]

2. States may also improve the accuracy of their voter rolls by comparing their registration information with information from other databases. States can and do reconcile voter-registration information with various sources of government data, including candidate or referendum petitions that list a voter's address,[43] tax records,[44] state census lists,[45] records of newly condemned or razed buildings,[46] and databases from other state agencies such as DMVs.[47] California also permits local elections officials to use information from private credit-reporting agencies to determine if a voter's registration information is up-to-date.[48]

Drawing broadly on these other sources of information is helpful because citizens are often more motivated to provide updated information for

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Elec. Law § 5-712(1); R.I. Gen. Laws § 17-9.1-26(a)(2); Va. Code § 24.2-428.1; Wash. Rev. Code § 29A.08.620(4)(a); *see also* Letter from Scott T. Nago, Chief Election Officer, State of Hawai'i, to T. Christian Herren, Jr., Voting Section Chief, Civil Rights Division, U.S. Department of Justice (July 28, 2017).

[42] Ohio appears to use undeliverable mail solely during its process of verifying new or updated registration information submitted by a voter. *See* Ohio Rev. Code § 3503.19(C)(3).

[43] Va. Code § 24.2-428.1.

[44] 17 Vt. Stat. § 2150(d)(2); *see generally* National Research Council, *Improving State Voter Registration Databases* 9 (2010) (internet).

[45] National Research Council, *supra*, at 9.

[46] Md. Code, Elec. Law §§ 3-502(c), 3-504(b)(2).

[47] *E.g.*, D.C. Mun. Regs. tit. 3, § 519.1; Fla. Stat. § 98.065(4)(a)-(b); Va. Code § 24.2-404(A)(9).

[48] Cal. Elec. Code § 2227.

purposes other than voter registration. In Alaska, for example, officials "sometimes use the Alaska Permanent Fund Division distribution list . . . to obtain current address information" because residents must submit up-to-date information to the Division "to receive a payment from the state's oil savings account earnings."[49] Similarly, citizens are more likely to provide updated address information to state tax authorities both because annual tax filings are mandatory and because many citizens receive tax refunds. These other sources may thus provide more accurate, direct evidence of voter information than the registration rolls themselves.

3. States can also rely on information from other States to share information about where voters may have moved. In Connecticut and Delaware, for instance, elections officials may begin the deregistration process if they learn that a registered voter has registered in another State. *See* Conn. Gen. Stat. § 9-21; Del. Code tit. 15, §§ 1704, 1707; *see also, e.g.*, N.Y. Elec. Law § 5-712(2); 9 N.Y.C.R.R. § 6217.8(d). Similarly, Virginia draws on the Driver's License Compact between States to identify when a voter may have moved out of State. *See* Va. Code § 24.2-427(C).

The enactment of HAVA in 2002 has helped to facilitate such cross-state information sharing. Before HAVA's enactment, local counties were in charge of voter registration lists in most states. Voters who moved between counties, even within the same state, often appeared on two (or more) county registration

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[49] National Research Council, *supra*, at 9.

lists for a considerable time,"[50] and "most of the responsibility was on the voter to inform" local elections officials that the voter had moved.[51] HAVA addressed this problem by requiring States to establish centralized, computerized registration lists "in such a manner that it will be possible at some point in the future for states to share data between them for the appropriate additions and removal of voters from their rolls." H.R. Rep. No. 107-329, pt. 1, at 36. And many States have supplemented these centralized registration lists by developing easier ways for voters to check their registration status online and electronically update their address information. See *supra* at 9-11.

The statewide, electronic voter registration rolls that HAVA required have enabled States to undertake more ambitious and comprehensive efforts to share voter information and thereby track changes of residence that affect voter eligibility.[52] For example, twenty States (including Ohio) and the District of Columbia currently participate in the Electronic Registration Information Center (ERIC), which provides a mechanism for member States to compare

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[50] *See* Presidential Comm'n on Election Admin., *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 23 (Jan. 2014) (internet); *see id.* at 28.

[51] Orange County (Calif.) Registrar of Voters, *Voter Registration Accuracy and Voter List Maintenance* 3 (2012) (internet).

[52] *See* National Research Council, *supra*, at 28; Presidential Comm'n on Election Admin, *The American Voting Experience, supra*, at 28-29; *see also, e.g.*, Conn. Gen. Stat. § 9-50c(a); Va. Code §§ 24.2-404(A)(10), 24.2-427(B); Wash. Rev. Code § 29A.08.135.

their voter registration data with similar data from other States.[53]

States have also entered into smaller regional information-sharing agreements. For example, in 2008, Oregon and Washington entered into a pilot interstate voter registration database matching project under which a database of 3.4 million Washington voters was matched against a database of 2 million Oregon voters to identify dually registered voters. The success of this project "demonstrated that an interstate matching project can be carried out with relative ease."[54]

Such regional projects may be particularly effective in States with large metropolitan areas that span jurisdictional borders or States with voters who typically relocate in predictable ways.[55] For example, the Cincinnati metropolitan area spans the States of Ohio, Kentucky, and Indiana; the New York metropolitan area spans the States of New York, New Jersey, and Connecticut; and the Washington metropolitan area spans the District of Columbia and the States of Maryland and Virginia. Relocations within those areas are relatively common. In addition, studies have shown that residents of New York typically relocate to New Jersey or California; residents of Ohio often relocate to Michigan and Pennsylvania;

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[53] The Pew Charitable Trusts, *Electronic Registration Information Center* (internet); ERIC, Summary of Membership Guidelines and Procedures (internet); ERIC, *Who We Are* (internet).

[54] R. Michael Alvarez et al., *Interstate Voter Registration Database Matching: the Oregon-Washington 2008 Pilot Project* 9 (Aug. 10, 2009) (internet).

[55] *See, e.g., id.* at 1.

and residents of many States retire to Florida.[56] Cross-state information sharing along these well-established migration paths would improve the States' ability to track the movement of voters.

To be sure, information-sharing between States must be done cautiously to ensure that additional errors are not introduced by this process. For example, a different multistate information-sharing program, the Interstate Voter Registration Crosscheck Program, has been subject to criticism for erroneously identifying voters as illegally voting in multiple jurisdictions.[57] States have a responsibility to ensure that the procedures and practices for these types of projects avoid such errors.

II. Using Voter Inactivity as a Trigger for Deregistration Imposes Substantial Harm While Serving Limited Purposes.

Because voter inactivity is a poor measure to identify voters who have changed their residence, relying on inactivity to focus a State's deregistration efforts threatens harm to eligible voters that is disproportionate to any marginal benefit to the State. In amici States' experience, erroneous purging of eligible voters can cause serious injury to voters by denying them the opportunity to exercise their right to vote, and further imposes serious costs on local and

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[56] U.S. Census Bureau, *State-to-State Migration Flows* (2015) (internet); U.S. GAO, *supra*, at 28.

[57] *See* Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections* (Jan. 13, 2017) (internet) (finding that purging voter rolls using Crosscheck data would risk "eliminat[ing] about 200 registrations used to cast legitimate votes for every one registration used to cast a double vote").

state elections officials who must correct any such errors. These harms cannot be justified by the slim possibility that voter inactivity will accurately identify some number of voters who have moved away—particularly when other, better methods will already have identified most or perhaps all such voters.

1. For years, the most common problems on Election Day have concerned voters who have been erroneously omitted from the registration rolls.[58] "An especially infuriating barrier eligible voters can face is to show up on Election Day, believing (perhaps rightly) that they are qualified to vote, and then be turned away."[59] As the president of the National Association of Secretaries of State recently observed, these registration issues—not voter fraud—are the "biggest problem" facing elections administrators today.[60]

Erroneous deregistration is a serious problem that disenfranchises voters. Many voters do not discover that they have been purged until the day of the election, at which point it may be too late for them to cure the problem. Only a few States provide for same-day registration; in the other States, voters who discover on election day that they have been purged will be unable to cast a ballot in that election. The problem may be worse in primaries, as some States require voters to register with a political party weeks

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[58] Commission on Fed. Election Reform, *Building Confidence*, *supra*, at 9.

[59] National Comm'n on Fed. Election Reform, *To Assure Pride and Confidence*, *supra*, at 34.

[60] The Pew Charitable Trusts, *Election Security in America* (Mar. 8, 2017) (internet).

or months before the primary election. *Cf. Rosario v. Rockefeller*, 410 U.S. 752, 756-61 (1973) (upholding statute requiring primary voters to register in a political party at least 30 days before the *preceding* general election).[61]

Even if a voter promptly learns that he has been purged, the process of reregistering will itself be a burden that some voters may be unwilling or unable to undertake. *See, e.g., Beare*, 321 F. Supp. at 1104-05 (noting that registration practices had been "expensive, cumbersome, and inconvenient"). To this day, a significant number of Americans—one out of every ten adults—consider registration to be difficult, especially young and minority voters who already are less likely to vote. *See* Alvarez, Hall & Llewellyn, *supra*, at 386, 394, 397-403, 406. Moreover, eligible voters who are forced to reregister because of an erroneous removal may be alienated by the process and deterred from further civic engagement. *See* Cunningham, *supra*, at 386 & n.102.

2. Erroneously removing voters from the rolls also imposes costs on state and local elections officials. Mistakenly purging voters "unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again." S. Rep. No. 103-6, at 18. In addition, erroneous deregistration can create confusion and delay at the polls. "Voters whose information is missing from the rolls . . . require the time and attention

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[61] *See also, e.g.*, New York State Att'y Gen., *A Report on Voter Access in the 2016 Presidential Primary* 1 n.3 (Dec. 2016) (internet).

of officials."[62] "Oftentimes poll workers have to contact the local election office for instructions, request additional information from the voter to resolve the discrepancies, require the voter to complete paperwork such as an affidavit or registration application form, or require the voter to vote a provisional ballot."[63] "The result is a bottleneck at the check-in table that will slow the processing of voters and begin to cause backups and lines."[64] These costs can be tremendous and unduly burdensome for both voters and state and local officials. *Cf. Wit v. Berman*, 306 F.3d 1256, 1262 (2d Cir. 2002) (recognizing legitimate state interest in avoiding "chaos" from "massive disputes over registration").

3. The potential harms of using an unreliable metric such as voter inactivity to target voters for deregistration cannot be justified by any corresponding benefit to the States. There is plainly no benefit to *erroneously* removing an otherwise eligible voter from the rolls. Voter inactivity is a much poorer way of identifying changes of residence than other, more direct measures that a voter has moved.. And keeping nonvoters on the rolls imposes relatively few costs on States and leads to few if any cases of voter fraud. Voter fraud of any stripe has been "highly

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[62] *See* Presidential Comm'n on Election Admin, *supra*, at 25.

[63] Republican Nat'l Lawyers Ass'n, *RNLA Response to the Report and Recommendations of the Presidential Commission on Election Administration* 10 (April 2014) (internet).

[64] *Id.*

unusual" in recent years[65]—in New York, for example, the Attorney General received only two complaints of voter fraud during the general federal election last year, and neither was substantiated.[66] And there is even less evidence that voter fraud has been committed by an individual who voted twice because of obsolete registration information that would have been purged under a procedure like Ohio's Supplemental Process. Unsupported or exaggerated fears of voter fraud do not justify the concrete harms that flow from stripping real, eligible citizens of their right to vote.

To be sure, amici States retain an interest in maintaining "accurate and up-to-date voter registration lists," S. Rep. No. 103-6, at 18, even if fraud is unlikely to occur. But the low risk of harm from keeping inactive voters on the rolls, absent better information that they have changed their residence, informs our decisions about what criteria are appropriate for identifying the voters who are the focus of our deregistration efforts. Here, the disproportionate harm threatened by the use of voter inactivity easily outweighs any marginal benefit that this metric might provide as a proxy for change of residence.

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[65] The Pew Charitable Trusts, *Election Security in America*, *supra* (interview with the president of the National Association of Secretaries of State).

[66] *See* Letter from Eric T. Schneiderman to Hon. Elijah E. Cummings et al., dated Feb. 22, 2017, at 1 (internet).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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